U.S. Department of Labor

Office of Administrative Law Judges
2 Executive Campus, Suite 450
Cherry Hill, NJ 08002

(856) 486-3800
(856) 486-3806 (FAX)

Issue Date: 03 February 2005

CASE NO.: 2003-BLA-06197

In the Matter of:

GEORGE L. FUMICH
Claimant,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest.

Appearances:

Richard A. Vandal, Esq.
For the Claimant.

Mary L. Bradley, Esq.
For the Director.

Before: RALPH A. ROMANO
Administrative Law Judge

DECISION AND ORDER – DENIAL OF BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. §§901-945 ("the Act" or "the BLBA") and the regulations issued thereunder, which are found in Title 20 of the Code of Federal Regulations. Regulations referred to herein are contained in that Title.[1]

Benefits under the Act are awarded to coal miners who are totally disabled within the meaning of the Act due to pneumoconiosis, or to the survivors of coal miners whose death was due to pneumoconiosis. Pneumoconiosis, commonly known as black lung, is a dust disease of the lungs resulting from coal dust inhalation.

A formal hearing was scheduled to be held on June 24, 2004, however, by joint motion filed on June 15, 2004, the parties requested that this matter be decided on the record. By Order dated June 16, 2004, the motion was granted and both parties were afforded the opportunity to

[1] All applicable regulations which are cited in this Decision and Order are included in Title 20, Code of Federal Regulations.

submit additional evidence and simultaneous briefs. Both parties filed briefs in this matter. By Notice of Re-Assignment dated November 12, 2004, the parties were advised that the case had been assigned to the undersigned and that the record had been closed.

Issues

The following issues are presented for resolution:

1. Whether the Miner worked at least six years in or around one or more coal mines;

2. Whether the Miner has pneumoconiosis;

3. Whether the Miner's pneumoconiosis arose out of coal mine employment;

4. Whether the Miner is totally disabled; and

5. Whether the Miner's disability is due to pneumoconiosis.

(DX 29).

Based upon a thorough analysis of the entire record in this case, with due consideration accorded to the applicable statutory provisions, regulations, and relevant case law, I hereby make the following:

Findings of Fact and Conclusions of Law

Procedural Background

The Claimant, George L. Fumich, filed an application for benefits on August 8, 2001. (DX 1). On December 30, 2002, the Director, Office of Worker's Compensation Programs, issued a Proposed Decision and Order – Denial of Benefits. (DX 21). The Claimant requested a revision of that decision by letter dated January 27, 2003. (DX 22). The Director issued a Revised Proposed Decision and Order – Denial of Benefits on May 5, 2003, and on May 19, 2003, the Claimant filed a request for a formal hearing. (DX 26, 27). His claim was referred to the Office of Administrative Law Judges on June 23, 2003. (DX 29).

Factual Background

Claimant was born on March 28, 1928, and he has a ninth grade education. (DX 1). He married Mazellda Daniel Burnosky on September 27, 1986 and they remain married. (DX 4). She is his sole dependent for purposes of possible benefit augmentation. (DX 1).

Coal Mine Employment

In his application for benefits, Claimant alleged five to six years of coal mine employment, indicating that he was last employed as a coal miner in February of 1953. (DX 1).

At the time he filed his application for benefits, he was working part-time for Friedman Buick. (DX 1). The Director has conceded five years of coal mine employment. (DX 21).

In his Employment History form, the Claimant listed coal mine employment from 1947 to 1953. (DX 2). The Social Security Administration's Itemized Statement of Earnings lists coal mine employment starting in 1947 with McCarty Coal Co. and ending in the second quarter of 1953. (DX 3). Those records establish a total of 5.5 years of coal mine employment. Based upon the documented evidence of record, I find that the Claimant has established 5.5 years of coal mine employment.

Applicable Law

Because this claim was filed after the enactment of the Part 718 regulations, Claimant's entitlement to benefits will be evaluated under the Part 718 standards. 20 CF.R. §718.2. In order to establish entitlement to benefits under Part 718, Claimant bears the burden of establishing the following elements by a preponderance of the evidence: (1) he suffers from pneumoconiosis, (2) the pneumoconiosis arose out of coal mine employment, (3) he is totally disabled, and (4) his total disability is caused by pneumoconiosis. *See generally Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994); *see also 20 C.F.R. §§ 718.201 – 718.204.*

Medical Evidence of Record

Chest X-rays

Chest x-rays may reveal opacities in the lungs caused by pneumoconiosis and other diseases. Larger and more numerous opacities result in greater lung impairment. The quality standards for chest x-rays and their interpretations performed before January 19, 2001, are found at 20 C.F.R. § 718.102 and Appendix A of Part 718. The following table summarizes the x-ray findings available in this case. The existence of pneumoconiosis may be established by chest x-rays classified as category 1, 2, 3, A, B, or C according to ILO-U/C International Classification of Radiographs. Small opacities (1, 2, or 3) (in ascending order of profusion) may classified as round (p, q, r) or irregular (s, t, u), and may be evidence of "simple pneumoconiosis." Large opacities (greater than 1 cm) may be classified as A, B or C, in ascending order of size, and may be evidence of "complicated pneumoconiosis." A chest x-ray classified as category "0," including subcategories 0/-, 0/0, 0/1, does not constitute evidence of pneumoconiosis. 20 C.F.R. § 718.102(b).

Physicians' qualifications appear after their names. Qualifications of physicians are abbreviated as follows: B= NIOSH certified B-reader; BCR= board-certified in radiology. Readers who are board-certified radiologists and/or B-readers are classified as the most qualified. *See Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 145 n. 16 (1987); *Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 1276 n.2 (7th Cir. 1993). B-readers need not be radiologists.

Ex. No.	Date of X-ray	Physician/Qualifications	Impression
DX 12	11/7/01	Siwik	Emphysema and scarring, negative for acute process
DX 13	11/77/01	Sargent B BCR	Quality 1
DX 14	11/7/01	Gaziano B	No pneumo
DX 25	5/28/02	Ahmed B BCR	p/t 1/1
DX 25	11/30/02	Ahmed B BCR	p/t 1/1

Biopsies and Autopsies

Biopsies and autopsies may be the basis for a finding of the existence of pneumoconiosis. There is no such evidence in the record.

Pulmonary Function Studies

Pulmonary function studies are tests performed to measure obstruction in the airways of the lungs and the degree of impairment of pulmonary function. The greater the resistance to the flow of air, the more severe the lung impairment. The studies range from simple tests of ventilation to very sophisticated examinations requiring complicated equipment. The most frequently performed tests measure forced vital capacity (FVC), forced expiratory volume in one-second (FEV_1) and maximum voluntary ventilation (MVV). The quality standards for pulmonary function studies are found at 20 C.F.R. § 718.103 and Appendix B. The following chart summarizes the results of the pulmonary function studies available in this case. "Pre" and "post" refer to administration of bronchodilators. If only one figure appears, bronchodilators were not administered. In a "qualifying" pulmonary study, the FEV_1 must be equal to or less than the applicable values set forth in the tables in Appendix B of Part 718, and either the FVC or MVV must be equal to or less than the applicable table value, or the FEV_1/FVC ratio must be 55% or less. 20 C.F.R. § 718.203(b)(2)(i).

The record contains the pulmonary function studies summarized below.

DATE	EX. NO.	PHYSICIAN	AGE/HT.	FEV_1	FVC	MVV	EFFORT	QUALIFIES
11/7/01	DX 8	Dr. Liu	73/71"	1.28 1.54*	1.92 2.54*		Poor Poor	Yes Yes
5/23/02	DX 10	Dr. Liu	74/71"	.98 1.72*	2.29 2.53*	30	Good Good	Yes Yes

*post-bronchodilator

Dr. Liu noted that the November 7, 2001 spirometry indicated suboptimal effort because the Claimant's effort was not reproducible. (DX 8). Dr. Katzman, who is board-certified in internal medicine, found the study to be invalid due to less than optimal effort, cooperation and comprehension. (DX 9). He noted that the efforts were not reproducible.

The May 23, 2002 study was found by Dr. Liu to indicate a severe obstructive ventilatory impairment with significant response to bronchodilator, the presence of mild hyperinflation distribution abnormality but no obvious diffusion defect corrected for the lung volumes. (DX 10). Dr. Liu found this to be compatible with the clinical diagnosis of severe COPD of the chronic obstructive bronchitis type with superimposed asthmatic bronchitis component. Dr. Liu found an improvement in the FEV1 and baseline FVC from the 2001 study and suggested that continued bronchodilator therapy would be beneficial. Dr. Katzman found the May 23, 2002 study to be invalid, due to an insufficient number of FVC, FEV1 or MVV tracings without an explanation for the deficiency and that the flow volume loops indicated less than optimal effort, cooperation and comprehension. (DX 11). Dr. Katzman noted that there was only one pre and one post bronchodilator effort.

In an affidavit dated January 27, 2003, the Claimant affirmed that he performed the two pulmonary function studies "to the best of his ability providing maximum effort at all times." (DX 22).

Arterial Blood Gas Studies

Blood gas studies are performed to measure the ability of the lungs to oxygenate blood. A defect will manifest itself primarily as a fall in arterial oxygen tension either at rest or during exercise. The blood sample is analyzed for the percentage of oxygen (PO_2) and the percentage of carbon dioxide (PCO_2) in the blood. A lower level of oxygen (O_2) compared to carbon dioxide (CO_2) in the blood indicates a deficiency in the transfer of gases through the alveoli which may leave the miner disabled. The quality standards for arterial blood gas studies are found at 20 C.F.R. § 718.105. A "qualifying" arterial gas study yields values which are equal to or less than the applicable values set forth in the tables in Appendix C of Part 718. If the results of a blood gas test at rest do not satisfy Appendix C, then an exercise blood gas test can be offered. Tests with only one figure represent studies at rest only. Exercise studies are not required if medically contraindicated. 20 C.F.R. § 718.105(b). The following chart summarizes the one arterial blood gas study available in this case.

DATE	EX. NO.	PHYSICIAN	pCO2	pO2	QUALIFIES
11/7/01	DX 7	Dr. Liu	40	78	No

Medical Opinions

Medical opinions are relevant to the issues of whether the miner has pneumoconiosis, whether the miner is totally disabled, and whether pneumoconiosis caused the miner's disability. A determination of the existence of pneumoconiosis may be made if a physician, exercising sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers from pneumoconiosis as defined in §718.201. 20 C.F.R. §718.202(a)(4). Thus, even if the x-ray evidence is negative, medical opinions may establish the existence of pneumoconiosis. *Taylor v. Director, OWCP*, 9 B.L.R. 1-22 (1986). The medical opinions must be reasoned and supported by objective medical evidence such as blood gas studies, electrocardiograms, pulmonary

function studies, physical performance tests, physical examination, and medical and work histories. 20 C.F.R. §718.202(a)(4). Where total disability cannot be established by pulmonary function tests, arterial blood gas studies, or cor pulmonale with right-sided heart failure, or where pulmonary function tests and/or blood gas studies are medically contraindicated, total disability may be nevertheless found, if a physician, exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in employment, i.e., performing his usual coal mine work or comparable and gainful work. 20 C.F.R. §718.204(b)(2)(iv). With certain specified exceptions, the cause or causes of total disability must be established by means of a physician's documented and reasoned report. 20 C.F.R. §718.204(c)(2). Quality standards for reports of physical examinations are found at 20 C.F.R. §718.104. The record contains the following medical opinions relating to this case.

Dr. Andrew C. Liu examined Claimant on November 19, 2001. (DX 6). Dr. Liu recorded that the Claimant smoked cigarettes for thirty years, having quit smoking about thirty years ago and having consumed a pack per day. Coal mine employment from 1948 to 1953 was recorded, as was the fact that he worked as a truck driver subsequent to his coal mine employment. Dr. Liu found emphysema with chronic fibrotic changes upon chest x-ray, a normal sinus rhythm on EKG, mild hypoxemia on blood gas testing and a restrictive ventilatory impairment on pulmonary function testing. Based upon his examination, Dr. Liu concluded that the Claimant had a respiratory impairment due to a combination of occupational exposure and previous history of cigarette smoking. Dr. Liu found the impairment to be around "30% according to the AMA guide." The diagnosis listed by Dr. Liu was (1) COPD – obstructive pattern per PFT; and (2) restrictive defect per PFT probably related to occupational exposure. He found the etiology of the cardiopulmonary diagnosis to be (1) due to history of smoking and (2) due to occupation. In his opinion, the impairment was moderate.

Dr. Joseph Sopko examined the Claimant on November 19, 2002. (DX 20). Dr. Sopko is board-certified in internal medicine, pulmonary disease, and critical care medicine. Dr. Sopko recorded coal mine employment lasting approximately five years, with one of those years having been underground and a smoking history of one pack of cigarettes per day for ten years. The Claimant stopped smoking in 1969. Past medical history was positive for a myocardial infarction in 1992, angioplasty in 1993 and back surgery in 1999. Based upon his examination of the Claimant, which included the taking of histories and a lung volume study, as well as a review of the objective laboratory data obtained by Dr. Liu and the x-ray reading performed by Dr. Siwik, Dr. Sopko concluded that the Claimant had evidence of pneumoconiosis. He based this conclusion on the history of exposure to coal dust, a chest x-ray consistent with fibrosis and pulmonary function tests which showed a restrictive impairment "which is not explainable by any other diagnosis." Dr. Sopko noted that the pulmonary function testing performed by Dr. Liu indicated an FVC and FEV1 that apparently met the disability standards, a finding confirmed by "our lung volume study showing a total lung capacity of 68% of predicted."

Existence of Pneumoconiosis

The regulations define pneumoconiosis broadly:

(a) For the purpose of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or "clinical", pneumoconiosis and statutory, or "legal" pneumoconiosis.

(1) *Clinical Pneumoconiosis.* "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silico-tuberculosis, arising out of coal mine employment.

(2) *Legal Pneumoconiosis.* "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

(b) For purposes of this section, a disease "arising out of coal mine employment" includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.

(c) For purposes of this definition, "pneumoconiosis" is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.

20 C.F.R. §718.201.

20 C.F.R. §718.202(a), provides that a finding of the existence of pneumoconiosis may be based on (1) chest x-ray, (2) biopsy or autopsy, (3) application of the presumptions described in §§ 718.304 (irrebuttable presumption of total disability due to pneumoconiosis if there is a showing of complicated pneumoconiosis), 718.305 (not applicable to claims filed after January 1, 1982) or 718.306 (applicable only to deceased miners who died on or before March 1, 1978), or (4) a physician exercising sound medical judgment based on objective medical evidence and supported by a reasoned medical opinion. There is no evidence that Claimant had a lung biopsy, and, of course, no autopsy has been performed. None of the presumptions apply, because the evidence does not establish the existence of complicated pneumoconiosis, Claimant filed his claim after January 1, 1982, and he is still living. In order to determine whether the evidence establishes the existence of pneumoconiosis, therefore, I must consider the chest x-rays and medical opinions. Absent contrary evidence, evidence relevant to either category may establish the existence of pneumoconiosis. In the face of conflicting evidence, however, I must weigh all

of the evidence together in reaching my finding whether the Claimant has established that he has pneumoconiosis. *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22 (3rd Cir. 1997).

Of the five available x-ray readings in this case, one was read for an assessment of its quality, one was not read for the purpose of classifying pneumoconiosis, one was negative and two were positive. Dr. Gaziano, a B-reader, found the November 7, 2001 x-ray to be negative while Dr. Ahmed, a B-reader and board-certified radiologist, found the November 30, 2002 and May 28, 2002 x-rays to be positive for the disease.

For cases with conflicting x-ray evidence, the Regulations specifically provide,

> Where two or more X-ray reports are in conflict, in evaluating such X-ray reports consideration shall be given to the radiological qualifications of the physicians interpreting such X-rays.

20 C.F.R. § 718.202(a)(1); *Dixon v. North Camp Coal Co.*, 8 B.L.R. 1-344 (1985); *Melnick v. Consolidation Coal Co.*, 16 B.L.R. 1-31, 1-37 (1991). Readers who are board-certified radiologists and/or B-readers are classified as the most qualified. The qualifications of a certified radiologist are at least comparable to if not superior to a physician certified as a B-reader. *Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211, 1-213 n.5 (1985). Greater weight may be accorded to x-ray interpretations of dually qualified physicians. *Sheckler v. Clinchfield Coal Co.*, 7 B.L.R. 1-128, 1-131 (1984). Based upon the preponderance of positive readings, by Dr. Ahmed, who is the most highly qualified physician to render an assessment regarding the existence of the disease upon x-ray reading, I find that pneumoconiosis has been established pursuant to 20 C.F.R. § 718.202(a)(1).[2]

I must next consider the medical opinions. The Claimant can establish that he suffers from pneumoconiosis by well-reasoned, well-documented medical reports. A "documented" opinion is one that sets forth the clinical findings, observations, facts, and other data upon which the physician based the diagnosis. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19, 1-22 (1987). An opinion may be adequately documented if it is based on items such as a physical examination, symptoms, and the patient's work and social histories. *Hoffman v. B&G Construction Co.*, 8 B.L.R. 1-65, 1-66 (1985); *Hess v. Clinchfield Coal Co.*, 7 B.L.R. 1-295, 1-296 (1984); *Justus v. Director, OWCP*, 6 B.L.R. 1-1127, 1-1129 (1984). A "reasoned" opinion is one in which the judge finds the underlying documentation and data adequate to support the physician's conclusions. *Fields,* above. Whether a medical report is sufficiently documented and reasoned is for the judge to decide as the finder-of-fact; an unreasoned or undocumented opinion may be given little or no weight. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149, 1-155 (1989) (en banc). An unsupported medical conclusion is not a reasoned diagnosis. *Fuller v. Gibraltar Corp.*, 6 B.L.R. 1-1291, 1-1294 (1984). A physician's report may be rejected where the basis for the physician's opinion cannot be determined. *Cosaltar v. Mathies Coal Co.*, 6 B.L.R. 1-1182, 1-1184 (1984). An opinion may be given little weight if it is equivocal or vague.

[2] It is to be noted that while in the Proposed Decision and Order, the Director conceded the existence of pneumoconiosis due to coal mine employment, in his post-hearing brief, the Director argued otherwise.

Griffith v. Director, OWCP, 49 F.3d 184, 186-187 (6th Cir. 1995); *Justice v. Island Creek Coal Co.*, 11 B.L.R. 1-91, 1-94 (1988); *Parsons v. Black Diamond Coal Co.*, 7 B.L.R. 1-236, 1-239 (1984).

The qualifications of the physicians are relevant in assessing the respective probative values to which their opinions are entitled. *Burns v. Director, OWCP*, 7 B.L.R. 1-597, 1-599 (1984). More weight may be accorded to the conclusions of a treating physician as he or she is more likely to be familiar with the miner's condition than a physician who examines him episodically. *Onderko v. Director, OWCP*, 14 B.L.R. 1-2, 1-6 (1989). However, a judge "is not required to accord greater weight to the opinion of a physician based solely on his status as claimant's treating physician. Rather, this is one factor which may be taken into consideration in . . . weighing . . . the medical evidence . . ." *Tedesco v. Director, OWCP*, 18 B.L.R. 1-103, 1-105 (1994).

In the instant case, Dr. Liu performed a comprehensive examination of the Claimant, which included the taking of a chest x-ray, blood gas studies and pulmonary function testing. He found coal worker's pneumoconiosis to be present, further finding a moderate impairment. Dr. Sopko, whose examination did not include the objective laboratory studies conducted by Dr. Liu, but did include a review of the results obtained by Dr. Liu, also found pneumoconiosis to be present and opined that the pulmonary function studies met disability standards.

In reviewing these two medical opinions, I find them to be sufficient to establish that the Claimant is suffering from coal worker's pneumoconiosis. There is no contradictory medical opinion evidence of record. Thus, I find that the medical opinions of record establish that the Claimant has pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). When weighing all of the contrary evidence in the record, I find that the positive x-ray readings rendered by Dr. Ahmed and the medical opinion evidence of record outweigh same and are sufficient to establish that the Claimant does suffer from pneumoconiosis.

Arising Out of Coal Mine Employment:

Next, the Claimant must establish that his pneumoconiosis arose, at least in part out of coal mine employment. *See §718.203 (a)*. It is presumed that the pneumoconiosis of a Claimant who establishes ten or more years of coal mine employment arose out of coal mine employment. *Id.* As in this case, the Claimant has only established 5.5 years of coal mine employment, he is not entitled to that presumption. Accordingly, the Claimant must establish, by competent medical evidence, that his pneumoconiosis is significantly related to or substantially aggravated by the dust exposure of his coal mine employment. *Shoup v. Director, OWCP,* 11 BLR 1-110 (1987). Upon reviewing the medical opinion evidence of record, I find that evidence sufficient to establish that the pneumoconiosis suffered by the Claimant is significantly related to his coal mine employment. There is no contrary medical opinion evidence of record on this issue.

Total Disability

In order to be entitled to benefits under the Act, the Claimant must establish total disability due to pneumoconiosis. A miner is considered totally disabled if he has complicated

pneumoconiosis, 30 U.S.C. §921(c)(3), 20 C.F.R. §718.304, or if he has a pulmonary or respiratory impairment to which pneumoconiosis is a substantially contributing cause, and which prevents him from doing his usual coal mine employment and comparable gainful employment, 30 U.S.C. §902(f), 20 C.F.R. §718.204(b) and (c). The Regulations provide five methods to show total disability other than by the presence of complicated pneumoconiosis: (1) pulmonary function studies; (2) blood gas studies; (3) evidence of cor pulmonale; (4) reasoned medical opinion; and (5) lay testimony. 20 C.F.R. § 718.204(b) and (d). Lay testimony may only be used in establishing total disability in cases involving deceased miners, and in a living miner's claim, a finding of total disability due to pneumoconiosis cannot be made solely on the miner's statements or testimony. 20 C.F.R. §718.204(d) ; *Tedesco v. Director, OWCP*, 18 B.L.R. 1-103, 1-106 (1994). There is no evidence in the record that Claimant suffers from complicated pneumoconiosis or cor pulmonale. Thus I will consider pulmonary function studies, blood gas studies and medical opinions.

In the instant case, the two pulmonary function studies of record were found to be invalid by Dr. Katzman and indeed, Dr. Liu found the 2001 study to be questionable. Accordingly, I find that the pulmonary function studies are not reliable indicators of the Claimant's pulmonary capability and that total disability has not been established pursuant to 20 C.F.R. §718.204(b)(2)(i).

There is one blood gas study of record. It failed to produce values indicative of total disability. Accordingly, I find that total disability has not been established pursuant to 20 CFR § 718.204(b)(2)(ii).

The final means of establishing total disability is by means of medical opinion evidence. Dr. Liu found a moderate impairment in 2001 and a severe obstructive impairment upon pulmonary function testing in 2002. Dr. Sopko, relying upon the pulmonary function testing conducted by Dr. Liu, found that the Claimant's pulmonary function testing produced values "that apparently meet disability standards." Given that Dr. Liu appears to rely primarily on the pulmonary function testing to reach his conclusion regarding pulmonary impairment and the tests upon which he relies were found to be invalid, I do not find his opinion on this issue to be particularly persuasive.

Dr. Sopko also relies upon the testing performed by Dr. Liu, testing which was found to be invalid, while not having been given the opportunity to review the reports of Dr. Katzman or otherwise render an opinion regarding the validity of those studies, prior to rendering his assessment. He does not affirmatively find total disability, merely remarking that the pulmonary function tests produced values which "apparently" meet disability standards. I do not find his medical opinion to be particularly well-reasoned or well-documented, further finding his opinion to be equivocal on the issue of disability and based on an erroneous smoking history. In this respect, Dr. Liu recorded thirty pack years, the pulmonary function testing reports indicated twenty pack years and Dr. Sopko, by contrast, found ten pack years. I find that the Claimant has a smoking history of at least twenty pack years, double that found by Dr. Sopko.

In sum, taking into account that the burden is on the Claimant to affirmatively establish every element of his entitlement to benefits and when weighing the medical opinion evidence in

order to determine whether it is reasoned and thus, sufficient to meet the Claimant's burden, I do not find that that evidence sufficiently reasoned to meet the Claimant's burden on this issue. The blood gas study conducted by Dr. Liu failed to produce values indicative of total disability and the pulmonary function testing he conducted was found to be invalid. Dr. Liu fails to adequately explain these findings or to provide a reasoned and well-documented medical judgment on the issue of total disability, given his primary stated reliance on his own pulmonary function testing. Dr. Sopko relies heavily on the pulmonary function testing conducted by Dr. Liu and does not affirmatively find total disability, rendering his medical opinion also questionable. As there is no reasoned medical opinion sufficient to establish total disability, I find that the evidence fails to establish that Claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv) and that total disability has not been established pursuant to 20 C.F.R. §718.204(b).

Causation of Total Disability

Even if total disability had been established, Claimant would still need to establish that pneumoconiosis is a "substantially contributing cause" to his disability. A "substantially contributing cause" is one which has a material adverse effect on the miner's respiratory or pulmonary condition, or one which materially worsens another respiratory or pulmonary impairment unrelated to coal mine employment. 20 C.F.R. §718.204(c) ; *Bonessa v. U.S. Steel Corp.*, 884 F.2d 726, 734 (3rd Cir. 1989).

The Benefits Review Board has held that §718.204 places the burden on the claimant to establish total disability due to pneumoconiosis by a preponderance of the evidence. *Baumgardner v. Director, OWCP*, 11 B.L.R. 1-135 (1986). For the reasons set forth above, I find the opinions of Drs. Sopko and Liu are insufficient to establish total disability or total disability due to pneumoconiosis. In the medical report form he filled out, Dr. Liu finds that the COPD suffered by the Claimant is due to tobacco abuse, while he finds the restrictive defect on pulmonary function testing "probably related to occupational exposure." The latter opinion is equivocal at best and insufficient to meet the Claimant's burden of proof. It is insufficient to establish that any pulmonary disability suffered by the Claimant is substantially contributed to by his pneumoconiosis. Dr. Sopko finds that the pulmonary function tests "apparently meet disability standards," failing, however, to provide the etiology for same, failing to link any such disability to coal worker's pneumoconiosis as opposed to the emphysema and other pulmonary conditions he finds in the Claimant. As noted above, I also find that Dr. Sopko relies on a smoking history which is significantly less than that actually had by the Claimant, rendering any opinion he may have regarding the etiology of any pulmonary disability suffered by the Claimant, questionable at best.

I further find that both physicians fail to adequately explain how they can determine that any pulmonary disability they find the Claimant to be suffering from, is the result of coal mine dust exposure which lasted for five years and ended in 1953, as opposed to tobacco abuse which lasted thirty years and ended in 1969. In sum, I find that the evidence is insufficient to meet Claimant's burden of proving that any pulmonary impairment from which he suffers is substantially contributed to by coal worker's pneumoconiosis. Therefore, I further find that Claimant is unable to meet his burden of establishing that he is totally disabled due to coal

worker's pneumoconiosis, and that same has not been established pursuant to 20 C.F.R. § 718.204(c).

Entitlement

Because the Claimant has failed to meet his burden to establish that he is totally disabled by pneumoconiosis, he has failed to establish that he is entitled to benefits under the Act.

Attorney's Fees

The award of an attorney's fee under the Act is permitted only in cases in which the claimant is found to be entitled to benefits. Section 28 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §928, as incorporated into the Black Lung Benefits Act, 30 U.S.C. §932. Since benefits are not awarded in this case, the Act prohibits the charging of any fee to the Claimant for services rendered to him in pursuit of this claim.

ORDER

The claim of George L. Fumich for benefits under the Act is DENIED.

A

RALPH A. ROMANO
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with the Decision and Order may appeal it to the Benefits Review Board within 30 (thirty) days from the date of this Decision by filing a Notice of Appeal with the Benefits Review Board at P.O. Box 37601, Washington, D.C. 20018-7601. A copy of this Notice must be served on Donald S. Shire, Associate Solicitor, Room N-2117, 200 Constitution Avenue, N.W., Washington, D.C. 20210.